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No. 09-

Supreme Court, U.S.
FILED
09-193 AUG 12 2009

OFFICE OF THE CLERK

In The

Supreme Court of the United States

JANICE ABNER,

Petitioner,

v.

PROBATE COURT OF MOBILE COUNTY, ALABAMA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Alabama

PETITION FOR A WRIT OF CERTIORARI

JANICE ABNER, *Petitioner*
888 Victor Avenue, Unit 16
Inglewood, California 90302
310-412-5710

QUESTION PRESENTED

Whether The Supreme Court of Alabama denied a Constitutional right secured by The Privileges and Immunities Clause of Amendment Fourteen in failure to entertain jurisdiction over action challenging constitutionality of Alabama Code, Section 43-2-22(a) barring non residents of Alabama from appointment as conservators to estates of late relatives in Alabama.

PARTIES TO THE PROCEEDINGS

Janice Abner, Petitioner
Carol Ann George, Judicial Administrator, Probate Court of Mobile County, Alabama
Frank Kruse, Administrator, Probate Court of Mobile County, Alabama

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, Janice Abner, respectfully petitions for a writ of certiorari to review the decision of the Alabama Supreme Court in this case.

OPINIONS BELOW

The decision of Probate Court of Mobile County, Alabama (App. 1), the Order of the Supreme Court of Alabama (App. 2), the Order of the United States Supreme Court (App. 3), and the Order of the Supreme Court of Alabama (App. 4).

STATEMENT OF JURISDICTION

The jurisdiction of the United States Supreme Court rests over this matter pursuant to 28 U.S.C. § 1257(a). The judgment by the Supreme Court of Alabama was entered on May 14, 2009.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN CASE

Federal Constitution, Article IV, Section 2, entitles citizens of each state to all privileges and immunities of citizens in the several states.

Amendment XIV, Section 1, provides "All persons born or naturalized in the United States, and subject

to the jurisdiction thereof, are citizens of the United States, and of the states wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Alabama Code, Section 43-2-22(a) states to deny non residents appointment as conservators in Alabama, a non resident of the state shall not be appointed as an administrator of an estate in Alabama unless appointed an executor of same estate in another state.

Constitution of Alabama, Article 1, Section 13, affords to citizens of the state access to the courts of the state for any injury or harm for obtaining a remedy by due process of law.

STATEMENT OF CASE

On March 16, 2009, an application along with fee was filed with the Probate Court of Mobile County, Alabama, by petitioner seeking appointment as conservator to estate of deceased mother. Property in the estate as known consisted of an automobile, jewelry and antique collectibles. Probate Court of Mobile County, Alabama, absent disposition, returned the check for filing fee indicating application was denied.

Petitioner, as only child of decedent, sought appointment as conservator to distribute and sell property of goods and commodities in estate of decedent mother. Distribution was intended among relatives in Alabama.

In year 2004, despite non residency of Alabama, petitioner did donate from the sale of a home owned in the state one-fifth of profit to the Morningstar Baptist Church in Mobile, Alabama, to help commence a scholarship for needy high school graduates, and a health wellness program for senior citizens in the state.

In year 2005, a federal action for alleged wrongful death, medical malpractice was brought in the Federal District Court of Alabama alleging in addition denial of constitutional rights by private male physicians and medical center while mother was under their purported care. The Complaint was dismissed on the ground of lack of jurisdiction arising from failure of petitioner as plaintiff to establish diversity of citizenship.

In year 2006, the initial of two applications seeking appointment as conservator in Alabama of estate of deceased mother was brought in Probate Court of Alabama, and dismissed pursuant to Alabama Code, Section 43-2-22(a) barring non residents from appointment.

The initial petition was denied by Carol Ann George in official capacity as Judicial Administrator of the Probate Court of Mobile County, Alabama.

Petitioner having met statutory requisite under the Wrongful Death Act by prior application to Probate Court for conservator appointment did timely bring a complaint pursuant to Act for alleged medical malpractice against male private medical physicians in Alabama in June 2006. Complaint was dismissed on ground of lack of standing to bring action absent a conservator appointed to estate of near kin.

The trial court in Alabama also dismissed on ground of failure to attend hearing on motion to dismiss, although notice was not received at residence in California by certified mail, as required by Alabama Rules of Court when notice is sent to non residents. Petitioner was a pro per litigant due to failure to obtain legal representation.

Following dismissal of fore referenced complaint, an appeal and motion seeking to vacate judgment denying appeal were brought and denied. A review of the judgment by the Middle Appeals Court of Alabama denying appeal was brought by petition for certiorari to the Supreme Court of Alabama. Petition was denied absent the court entertaining jurisdiction.

Petitioner, on October 10, 2008, petitioned the United States Supreme Court for certiorari arising

from the decision by the Supreme Court of Alabama to not entertain matter seeking certiorari arising from judgment appeal by the Middle Appellate Court. Petition was denied on January 12, 2009.

The issues in Federal petition were if right to trial for the wrongful death – medical malpractice existed under civil right Code 42 U.S.C. § 1981, and if rights granted to states under Amendment X by the Federal Constitution supersede laws of Congress.

The operative facts in case were premised on denial of appeal seeking review of the decision by the trial court dismissing a wrongful death on ground of non appointment as conservator despite application by petitioner as a non resident was brought, but denied.

Following denial of Federal Certiorari, petitioner, as a pro se litigant, was advised by B. Kwaky Duren, Esquire of need to bring a constitutional challenge to Code Section 43-2-22(a) barring non residents from appointment as conservators for securing property of estate of deceased kin and act as a personal representative in bringing a wrongful death action in Alabama.

On February 23, 2009, a second application was brought in Probate Court of Mobile County, Alabama, seeking appointment as conservator to estate of

deceased mother in Alabama. The application fee of $100.00 was returned absent comment.

Petitioner, on March 16, 2009, brought a declaratory judgment action titled *Abner v. Probate Court of Alabama*, challenging constitutionality of Alabama Code, Section 43-2-22(a) pursuant primarily to Federal law, but the Alabama Constitution was also cited as an authority. Real parties to interest were Carol Ann George and Frank Kruse, administrators of the Probate Court.

Upon failure by respondents to filed defensive pleadings to complaint, petitioner moved for entry of default judgment pursuant to Rule 55 of the Federal Rules of Civil Procedure on May 9, 2009. On May 14, 2009, the Supreme Court of Alabama denied action seeking declaratory judgment despite failure of respondent to oppose move for entry of default by petitioner.

The declaratory judgment action challenging constitutionality of Alabama Code, Section 43-2-22 barring non residents from appointment as conservators to estates of deceased relatives in Alabama was denied unanimously and en banc by the Supreme Court of Alabama. Judgment was unaccompanied by an opinion, nor were authorities cited in judgment.

WHY CERTIORARI SHOULD BE GRANTED

The Supreme Court of Alabama erred as a matter of law in denying declaratory judgment action challenging constitutionality of Alabama Code, Section 43-2-22(a) barring appointment of non residents to heirs of decedent kin. There is nonexistent law arising from the Federal Constitution or by Congress authorizing states to legally discriminate against non residents seeking property of deceased relatives for engagement in commerce and trade. No points of authorities were cited by the Supreme Court of Alabama in support of denial of the action by petitioner seeking declaratory judgment.

The decisions by the Courts of this nation have consistently held a right is secured by a citizen of the United States to possess, enjoy and succeed property from a state under the Privileges and Immunities Clause of Amendment Fourteen.

The Supreme Court of Alabama departed from legal precedent set by the United States Supreme Court to rely instead as an authority a section of the Alabama Constitution as grounds to dismiss en banc and unanimously the action seeking declaratory judgment. Afore referenced section was inapplicable for rendering disposition of dismissal due to prior history of rulings by the Alabama Supreme Court contrary in deciding identical question presented in *Abner v. Probate Court of Mobile County, Alabama.*

ARGUMENT

THE SUPREME COURT OF ALABAMA ERRED IN FAILURE TO ENTERTAIN JURISDICTION OVER MATTER CHALLENGING COMMON LAW OF THE STATE BROUGHT BY A NON RESIDENT

A. Precedent Establishing Illegality of Alabama Code, Section 43-2-22(a) Went Unrecognized In Rendering Judgment To Dismiss Action

The Supreme Court of Alabama in denying declaratory judgment challenging constitutionality of Alabama Code, Section 43-2-22(a) cited no authority as ground for dismissal, and there was absent an opinion. The facts alleged in Statement of Facts premising this petition are action was brought subsequent to denial by Probate Court of Alabama of two applications seeking appointment to the estate of late parent in Alabama. Part (a) of afore referenced Code states "Nor shall any non resident of the State be appointed as administrator unless he is at the time executor or administrator of the same estate in some other state or territory or jurisdiction, duly qualified under the laws of that jurisdiction to an estate."

Petitioner sought appointment by Probate Court as only child and next of kin to intestate parent with intent to open up estate for sale of property therein personally known as antiques, jewelry, collectibles and an automobile left in the possession of relatives in the state. The United States Supreme Court in

deciding the issues in *Hicklin v. Orbeck* overruled the decision of the Appeals Court upholding requirement that non citizens of Alaska obtain residency cards as a condition for employment in the state. 98 S.Ct. 2482, 2492, 437 U.S. 522. In reversing, this Court held the statute was unconstitutional, and violated the Privileges and Immunities Clause of Amendment Fourteen serving to create a national economy . . .

The objective of the discriminatory Alaska Hire Statute in *Hicklin* was to reduce unemployment of its citizens. Although absolute immunity from discriminatory laws is unsecured by non residents of states, all biased legislation aimed to curtail fundamental rights of any suspect population is subject to strict scrutiny under the Constitution, absent evidence of a substantial reason, *Hicklin* at p. 3487.

A protection of non citizens through the provisions of the Privileges and Immunities Clause of Amendment Fourteen was expressed by the Court in *Tomer v. Witsell* in declaring "Even when the presence or activity of non residents causes or exacerbates the problem the State may seek to remedy, there must be a reasonable relation to the non citizens represented as a class, and the discrimination practiced against them." Quoting Honorable Justice Brennan at p. 3487 in citing *Tomer v. Witsell*, 334 U.S. 385, 68 S.Ct. 1165 (1948).

Contention is held by this petitioner the practice by Alabama of denying appointment to non residents capacity to act as conservator to estates of deceased

relatives is analogous to the hiring practices by Alaska in *Hicklin*. Contention is also held Alabama Code, Section 43-2-22(a) serves to promote an economic objective of the state. Referenced Code pertains to probate law, and purpose is to retain all taxable property within the state. Despite legitimate interests and objectives of a state, enforcement of a discriminatory statute serving to deny employment opportunities or equal protection to a population based on non residency violates Article IV, Section 2 of the United States Constitution, *Hicklin* at p. 2488, *Lockery v. Kravetz*.

Points of law establish even if a population of non seeking liberty rights to pursue employment or engage in commerce is small, state legislation denying right is unconstitutional by the Privileges and Immunities Clause of Amendment Fourteen. *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 299 (1984). Only if such legislation prevents the exercise of a fundamental right of individuals will strict scrutiny of the statute under the Constitution transpire. *Chimento v. Stark*, 353 F. Supp. 1211, 1218 (1973).

The facts in *Abner v. Probate Court of Mobile County, Alabama*, state an action challenging constitutionality of Alabama Code, Section 43-2-22 was brought by petitioner, and respondent as real parties to interest refused to assert a defense, and thereafter Abner as petitioner moved for entry of default. The

Supreme Court of Alabama en banc and unanimously denied petition seeking declaratory judgment absent opinion. Based on the foregoing facts, petitioner pleads inexistence of evidence of a compelling public interest for enforcement of section 43-2-22(a) by Alabama.

Petitioner further pleads even if the Supreme Court of Alabama had rendered judgment declaring referenced Code unconstitutional to set legal precedent, future decisions regarding eligibility of conservator in the State would impact a minimal population as reports indicate people are entering Alabama to remain in the state rather than egressing from. The entry commenced as reported by displacement of individuals due to Hurricane Katrina in year 2006.

As personally known by petitioner, a native of Alabama and continued visitor therein, the state is still sparsely populated in rural areas to accommodate growth in population in regards to the interest of the state government.

Historically the Courts have consistently held a right exists through the Privileges and Immunities Clause for citizens of other states to own property outside residence. The right also extends to remove by choice properties owned, *Slaughterhouse Cases*, 83 U.S. (16) Wall 36, 75 (1873). In deciding purpose of Article IV, Section 2, Clause 1 of the Federal Constitution, the Court in *Paul v. Virginia* concluded protection of citizens of the common states as property

owners was provided. Foremost the Court determined the limitation of protection existed to secure solely fundamental rights of citizens, with purpose of the Clause as expressed "To place the citizens of each state on the same footing with citizens of other states, so far as the advantages resulting from citizenship in those states are concerned. It relieves them from the disabilities of alienage in states, it inhibits discriminating legislation against them by other states, it gives them right of free ingress into other states, and egress from them, it insures to them in other States the same freedom possessed by the pursuit of happiness, and it secures to them in other States the equal protection of the law," pp. 247, 248, *Hicklin* citing *Paul v. Virginia*, 8 Wall. 159, 180, 19 L. Ed. 357 (1864).

Later federal questions were raised regarding taxation of property of non residents by states relative to Article IV, Section 2 of the Constitution. The Court in *Maxwell v. Burgee*, 40 S.Ct. 2, 8 (1919) in holding non residents possessed rights to remove properties from states, also decided the Constitution provided a right to states in determining tax rates for such removal. The Court also decided the states possessed power to determine types of restrictions deterring removal such as probability of unknown heirs *Ferry v. Spokane, Portland and Seattle Railroad Co., et al.*, 258 U.S. 313, 321 (1922).

Contention is held by petitioner that Alabama through enforcement of Code Section 43-2-22 disregarded legal precedent establishing the right of individuals to act as conservators in Alabama, and

choose whether or not to pursue property removal. The process is acquired initially through process with Probate Court of the State.

The denial by a state to non residents to access its courts violates the Privileges and Immunities Clause of Fourteen, *McKnett v. St. Louis Ry. Co.*, 45 S. Ct. 591, 599 (1934). This Court in a fore cited case reversed the decision of the Supreme Court of Alabama affirming judgment of the Lower Court of Appeals of preclusion of the trial court from legal duty to entertain jurisdiction over a complaint brought by a non resident of Alabama. The plaintiff sought economic recovery in relation to an alleged physical injury suffered.

A second goal of this petitioner in challenging the constitutionality of Alabama Code, Section 43-2-22(a) in *Abner v. Probate Court of Mobile County, Alabama*, was to secure trial in the state through action brought pursuant to the wrongful death Act of Alabama. An interest in trial arose from a lingering question whether physicians entrusted with license by the state to practice medicine were negligent causing the death of parent. Petitioner did suffer lost of employment in California despite acquiring tenure twenty years prior due to psychological and emotional debilitation emanating from futile attempts to secure in Alabama a trial.

Because the matter of medical physicians adhering to standards of care prescribed for the national community was a matter of concern of petitioner, two

prior cases brought in Alabama alleging wrongful death – medical malpractice were dismissed. The initial instant federal action was disposed of in year 2005 for failure to obtain diversity of citizenship. Following in year 2006 a state action for alleged wrongful death – medical malpractice was dismissed on ground of lack of standing to bring action in the absence of appointment of a conservator. Because requisite statutory compliance with Alabama Code, Section 43-2-22(a) did transpire prior by application to probate court seeking appointment as conservator, and was denied, appeal was brought in Alabama by petitioner.

The state action for alleged wrongful death where question of negligence still lingers was timely brought in year 2006 following a second autopsy performed by records and radiographic data of near kin opining death transpired from misdiagnosis. Foremost the medical record revealed a third opinion was unsecured despite fact medical diagnostic data was in conflict, and ample time existed to acquire a third opinion before surgery transpired.

Contention is held a right to trial was secured by the Alabama Constitution as petitioner was a citizen of the State at the time of death of parent by real estate holdings, while residing also dually in California. As factually alleged after death of immediate kin, California became sole state of residence and property in Alabama was sold in the State, with one-fifth of earnings donated by petitioner to Morning Star Missionary Church in Mobile, Alabama, in year

2004. Referenced institution still operates in Mobile, Alabama.

The Alabama Constitution Article 1, Section 13 provides "All Courts shall be open, and that for every person for any injury done on in his lands, goods, person or reputation shall have a remedy by due process of law, and right and justice shall be administered without sake denial or delay." Enacted in 1882, the Wrongful Death Act of Alabama (W.D.A., Alabama) incorporates statutory requirement a conservator must be appointed by Probate Court in the capacity of personal representative of a decedent. Code Section 43-2-22(a) prohibits non residents from appointment as conservators to estates of decedent kin with exception appointment exists in another state.

In actions challenging the constitutionality of the W.D.A., Alabama pursuant to the Eighth Amendment by defendants alleging excessive bail by jury awards, the State Supreme Court has consistently upheld legislation as constitutional, *Old Republic Union Ins. Co. v. Tillis Trucking*, 124 F.3d 1257 (1997). The Court in *Central Alabama Electric Cooperative v. Tapley* did affirm jury award while expressing the intent by the legislature for enforcement of Act as "belief in the sanctity of human life, the noble goals in preserving human life, and society's desire to punish those whose conduct cause a loss of human life." *Central Ala. Electr. Cooperative v. Tapley*, 546 So.2d at 376 (1989).

Petitioner pleads existence of opposing goals by Alabama to preserve human life, while promoting the economy of the state by retention of all taxable property therein.

Section 43-2-22(a) denies prior existence of the late citizen of the state by barring non residents to act as personal representatives of deceased relatives in Probate Court that is required to initiate a wrongful death action in the State.

A liberty right as contends was acquired by petitioner through the Privileges and Immunities Clause of Amendment Fourteen to access the Courts of Alabama to speak as personal representative of deceased parent. The right to speak and hear is afforded individuals also by Amendment One through Amendment Fourteen. This Court, in *Thornhill v. Alabama*, 310 U.S. 88, 106 (1940), reversed the decision of the Alabama Supreme Court upholding judgment rendered that a statute prohibiting striking workers from peacefully picketing a work location was lawful. As pertains to the matter of peaceful protest rights granted by Amendment One through Fourteen, the United States Supreme Court held "The safeguarding of these rights to the end that men may speak as they think on matters vital to them and that falsehoods may be exposed through the process of education and discussion is essential to free government." The Court further held "Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truths," at

p. 95. Individuals possess freedom to speak for their rights, *Mills v. Alabama*, 384 U.S. 214, 223 (1966).

B. The Judgment Dismissing Action Seeking Declaratory Relief Should be Reversed As The Alabama Supreme Court Departed From Established Case Law Set by Precedent of The Court

Among the facts stated in Statement of Facts in this petition are, petitioner brought action titled *Abner v. Probate Court of Mobile County, Alabama*, in March 2009 challenging constitutionality of Alabama Code, Section 43-2-22(a). Challenge was brought both pursuant to the Constitution of Alabama and the Federal Constitution, although argument rested primarily on latter authority. Petitioner did plead specific right to appointment as conservator of estate in Alabama also under the Equal Protection Clause citing *American Trust Company Inc. v. South Carolina State Board of Bank Control et al.*, 381 F. Supp. 313, 322 (1974), in relation to *Reed v. Reed, Administrator*.

In a related case, the United States Supreme Court reversed judgment of the Supreme Court of Idaho upholding a state statute providing only men be appointed as conservators, to deny female survivors entitlement upon application. 404 U.S. 71, 77 (1971).

The judgment by the Supreme Court of Alabama in action titled *Abner v. Probate Court of Mobile County, Alabama*, cited no authority to deny action, but language inferred action challenging constitutionality of Alabama Code, Section 43-2-22(a) was denied based on the immunity of Alabama to suit arising from Article 14 of the Alabama Constitution. The judgment did reference by name Judge of the Probate Court, Honorable Don Johnson, although real parties to interest were listed on complaint as Carol Ann George and Frank Kruse.

Facts also state in this current petition relative to foregoing facts, respondents failed to answer the complaint and move for entry of default was brought by petitioner, followed by the Supreme Court of Alabama denying en banc and unanimously petition seeking declaratory judgment. The Court rendered judgment based on Article 14 of the State Constitution prohibiting suits against the State, and departed from its precedent.

In deciding a 1971 question under the common law in *Aland v. Graham*, 287 Ala. 226, 250 So.2d 677 (1971), the Supreme Court of Alabama determined certain type suits were un prohibited by Clause 14, primarily those seeking no monetary judgment. Identified in *Aland* were the following type actions:

1. Actions seeking to compel performance of duty by state officials.

2. Actions seeking to enjoin state officials from enforcing an unconstitutional act.

3. Those type actions brought pursuant to the Declaratory Judgment Act, Title 7, seeking construction of a statute and its application to a given situation. (Subsequently held in *Good Hope Contracting Co. v. Alabama*, Ala., Lexis 137) (2007).

Contention is held by petitioner that by case type 3, the action of *Abner v. Probate Court of Alabama*, seeking declaratory judgment of Alabama Code, Section 43-2-22 as unconstitutional was precluded from dismissal based on Article 14 of the Constitution of Alabama. Referenced Article was ground for dismissal of an initial action in year 2008 for petition for certiorari prior brought by petitioner.

CONCLUSION

Wherefore, the petition for writ of certiorari should be granted.

Respectfully submitted,

JANICE ABNER, *Petitioner*
888 Victor Avenue, Unit 16
Inglewood, California 90302
310-412-5710

IN THE SUPREME COURT OF ALABAMA
May 14, 2009

1080766

Ex parte Janice Abner. PETITION FOR WRIT OF MANDAMUS: CIVIL (In re: Janice Abner v. Mobile Infirmary Medical Center et al.) (Mobile Probate Court).

ORDER

The petition for a writ of mandamus to be directed to the Honorable Don Davis, Judge of the Probate Court of Mobile County, Alabama, having been duly filed and submitted to the Court,

IT IS ORDERED that the petition for a writ of mandamus is denied.

Cobb, C.J., and Lyons, Stuart, Bolin, and Murdock, JJ., concur.

IN THE SUPREME COURT OF ALABAMA

[SEAL]

August 8, 2008

1060813

Ex parte Janice Abner. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS (In re: Janice Abner v. Mobile Infirmary Medical Center et al.) (Mobile Circuit Court: CV 06-2673; Civil Appeals: 2060218).

CERTIFICATE OF JUDGMENT

Writ Denied

The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari is denied.

PARKER, J. – Cobb, C.J., and See, Woodall, and Smith, JJ., concur.

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

January 12, 2009

Ms. Janice Abner
[Home Address Omitted]

Re: Janice Abner
v. Mobile Infirmary Medical Center, et al.
No. 08-632

Dear Ms. Abner:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

/s/ William K. Suter
William K. Suter, Clerk

STATE OF ALABAMA
COURT OF CIVIL APPEALS

[SEAL]

John H. Wilkerson, Jr.
Clerk

300 Dexter Avenue
Montgomery, AL 36104-3741

Rebecca C. Oates
Assistant Clerk

Phone (334) 242-4093
Fax (334) 242-4017

January 9, 2007

2060218

Janice Abner v. Mobile Infirmary Medical Center et al. (Appeal from Mobile Circuit Court: CV 06-2673)

You are hereby notified that the following action was taken in the above cause, by the Court of Civil Appeals

Motions to dismiss filed by appellees Gregory McGee, Jeffery Ickler, Donald Kirby, M.D., Terry Wilsdorf, M.D., Maher Sahawneh, M.D., Brian Arcement, M.D., and Mobile Infirmary Association d/b/a/ Mobile Infirmary Medical Center are granted. They are dismissed as appellees in this appeal.

/s/ John H. Wilkerson, Jr.
John H. Wilkerson, Jr.
Clerk, Court of Civil Appeals

THE COURT OF CIVIL APPEALS

[SEAL]

300 DEXTER AVENUE
MONTGOMERY, ALABAMA 36104-3741

JOHN H. WILKERSON, JR.
CLERK

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REBECCA C. OATES
ASSISTANT CLERK

EMAIL CVFILINGS@
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August 17, 2007

2060983

Janice Abner v. Alabama Board of Medical Examiners et al. (Appeal from Montgomery Circuit Court: CV-06-2470)

NOTICE

You are hereby notified that the following action was taken in the above cause by the Court of Civil Appeals:

Oral Argument Denied.

/s/ **John H. Wilkerson, Jr.**
John H. Wilkerson, Jr.
Clerk, Court of Civil Appeals

[SEAL]

Don Davis
Judge of Probate

Joe McEarchern, Jr.
Chief Clerk/Administrator

Richard T. Johnson, Jr.
Administrative Assistant

[Phone Numbers Omitted In Printing]

PROBATE COURT OF MOBILE COUNTY, ALABAMA

July 27th, 2006

Ms. Janice Abner
[Home Address Omitted]

In Re: Petition for Letters of Administration

Dear Ms. Abner:

As per our telephone conversation, I am returning to you the petition to open an intestate estate which was filed in our Court on July 7th, 2006.

Code of Alabama, §43-2-22 states (a) No person must be deemed a fit person to serve as executor who is under the age of 19 years, or who has been convicted of an infamous crime, or who, from intemperance, improvidence or want of understanding is incompetent to discharge the duties of the trust. **Nor shall any nonresident of the state be appointed as administrator unless he is at the time executor or administrator of the same estate in some other state or territory or jurisdiction, duly qualified under the laws of that jurisdiction.**

Also, I tracked, on the United States Postal Service website, the certified mail of your money orders for court cost and publication fee. The tracking information states that the item was accepted in INGLEWOOD, CA. It seems that this was sent to you. Please see the enclosed "Tract & Confirm". Also, there is a copy of the confirmation of our receipt of your petition for letters of administration.

As I stated earlier, you may want to contact Frank Kruse, the General Administrator for Mobile County, AL. His telephone number is 215-438-9100.

Very truly yours,

/s/ Carol Ann George
Carol Ann George
Judicial Coordinator

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

CLARENCE ABNER and JANICE ABNER,	)	
Plaintiffs,	)	**CIVIL ACTION**
v.	)	**NO. 04-0476-CG-M**
MOBILE INFIRMARY, *et al.*,	)	
Defendants.	)	

ORDER

This matter is before the court on motions of defendants to dismiss (Docs. 7, 11, 14, 20, 22), plaintiffs' responses thereto (Docs. 17, 26, 29, 30), defendants' replies (Docs. 27, 31, 33) and plaintiffs' response to the replies (Doc. 40). The court finds that federal question jurisdiction does not exist in this case, and further, that the action was not brought by the proper parties. Therefore, defendants' motions to dismiss are due to be granted.

BACKGROUND

Plaintiffs, Clarence and Janice Abner, proceeding *pro se*, brought this action seeking damages for the wrongful death of Lillian Abner. The complaint asserts federal question jurisdiction arising from defendants' alleged violation of a Medicare statute, 42

CFR § 35.15, which requires written consent of Medicare patients prior to performing certain medical procedures. The complaint also states that the action is also brought pursuant to Alabama Code § 22-8-1, which concerns consent requirements for medical treatment. Plaintiffs are the husband and daughter of decedent, Lillian Abner. The personal representative of decedent's estate has not appeared in this action as a party plaintiff or in any other capacity. Defendants are the medical facility where decedent was a patient and the doctors who, according to plaintiffs, "either ordered diagnostic intervention, served as consultant, or ordered the treatment of decedent while a patient at Mobile Hospital, without the informed consent of decedent, nor gave notice thereof, or received authorization from the family . . . " (Doc. 17 at p.3).

DISCUSSION

Rule 8 of the Federal Rules of Civil Procedure requires that federal courts give pleadings a liberal reading in the face of a motion to dismiss. *GJR Investments, Inc. v. County of Escambia,* 132 F.3d 1359, 1369 (11th Cir.1998). "This admonition is particularly true when the parties are proceeding *pro* se." *Id.* As the Eleventh Circuit has noted:

> Courts do and should show a leniency to *pro se* litigants not enjoyed by those with the benefit of a legal education. *See, e.g., Powell v. Lennon,* 914 F.2d 1459, 1463 (11th Cir.1990). Yet even in the case of pro se litigants this leniency does not give a court

> license to serve as *de facto* counsel for a party, *see Hall v. Bellmon,* 935 F.2d 1106, 1109 (10th Cir.1991), or to rewrite an otherwise deficient pleading in order to sustain an action, *see Pontier v. City of Clearwater,* 881 F.Supp. 1565, 1568 (M.D.Fla.1995).

GJR Investments Inc. v. County of Escambia, Fla., 132 F.3d 1359, 1369 (11th Cir. 1998). Thus, while plaintiffs' complaint should be read liberally, the court will not fabricate a jurisdictional basis that is not apparent from the complaint.

Defendants assert that plaintiffs have not established federal question jurisdiction. "Federal courts are courts of limited jurisdiction." *Burns v. Windsor Co.,* 31 F.3d 1092, 1095 (11th Cir. 1994).

> Under the federal question jurisdiction statute, 28 U.S.C. § 1331, a district court has subject matter jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." Whether a claim arises under federal law for purposes of 28 U.S.C. § 1331 is generally determined by the well-pleaded complaint rule, "which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiffs properly pleaded complaint." *Caterpillar, Inc. v. Williams,* 482 U.S. 386, 392, 107 S.Ct. 2425, 2429, 96 L.Ed.2d 318 (1987). A well-pleaded complaint presents a federal question where it "establishes either that federal law creates

> the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." *Franchise Tax Bd. v. Construction Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 27-28, 103 S.Ct. 2841, 2856, 77 L.Ed.2d 420 (1983).

Smith v. GTE Corp., 236 F.3d 1292, 1310 (11th Cir. 2001). Plaintiffs assert that this court has federal question jurisdiction because the case is brought under the Medicare Act. However, the complaint does not seek benefits under the Medicare Act. The complaint seeks "compensatory and general damages" for alleged "physical injury caused by misdiagnosis and wrongful suffering and immediate death due to misdiagnosis and negligence leading to said injury." The court finds that the claims do not arise under the Medicare Act, nor is plaintiffs' right to relief necessarily dependant on the resolution of a substantial question of federal law.

In *Ardary v. Aetna Health Plans of California, Inc.*, 98 F.3d 496 (9th Cir. 1996) certiorari denied (1997) 520 U.S. 1251, 117 S.Ct. 2408, 138 L.Ed.2d 174 (cited by both plaintiffs and defendants), the plaintiffs brought an action seeking compensatory and punitive damages for the improper denial of emergency medical services and misrepresentation of managed care to a Medicare patient. The Court found that the claims did not arise under the Medicare Act and that the action was improperly removed to federal court for the following reasons:

> First, the Ardarys' complaint does not "include any claims in which 'both the standing and the substantive basis for the presentation' of the claims" is the Act. *Heckler v. Ringer,* 466 U.S. 602, 615, 104 S.Ct. 2013, 2021-22, 80 L.Ed.2d 622 (1984) (citing *Weinberger v. Salfi,* 422 U.S. 749, 760-61, 95 S.Ct. 2457, 2464-65, 45 L.Ed.2d 522 (1975)) (emphasis added). The Ardarys seek general and punitive damages on the basis of negligence, intentional and/or negligent infliction of emotional distress, intentional and/or negligent misrepresentation, and professional negligence. The standing for these six claims are state common law theories and not the Act. Second, the state law claims are not "inextricably intertwined" with the denial of benefits. Although the Ardarys concede that their wrongful death complaint is "predicated on" Arrowest's failure to authorize the airlift transfer, the claims are not "inextricably intertwined" because the Ardarys are at bottom not seeking to recover benefits. *Ringer,* 466 U.S. at 614, 104 S.Ct. at 2021.

Ardary, 98 F.3d at 499-500. The claims asserted and damages sought by plaintiffs in the instant case are similar to the claims asserted and damages sought in *Ardary.*

Similarly, in *Merrell Dow Pharmaceuticals Inc. v. Thompson,* 478 U.S. 804, 106 S.Ct. 3229 (1986) (also cited by both plaintiffs and defendants), the Supreme Court held that the district court did not have

jurisdiction under 28 U.S.C. § 1331 where the plaintiff alleged a state tort claim but pointed to federal law as evidence of the standard of care. Given that there was no private right of action under the federal law in question, the Court examined whether a substantial question of law was implicated. It held that "the presence of the federal issue as an element of the state tort is not the kind of adjudication for which jurisdiction would serve congressional purposes and the federal system." *Id.* at 814, 106 S.Ct. 3229. The Court found no federal subject matter jurisdiction.

The Eleventh Circuit, following the rational of *Merrell Dow,* found no federal subject-matter jurisdiction over a discrimination claim based upon a breach of a duty created under the Americans with Disabilities Act. *Jairath v. Dyer,* 154 F.3d 1280 (11th Cir. 1998) (again cited by both sides). There the appeals court found that the district court lacked subject-matter jurisdiction over the case because the claims did not "arise under" federal law. The plaintiff had no standing to pursue the only federal private cause of action available under the ADA (i.e., for injunctive relief). *Id.* at 1284.

In the instant case, as in *Ardary, Merrell Dow* and *Jairath,* plaintiffs do not have standing to pursue a private cause of action under the federal statute in question. The Medicare Act provides for the Office of Inspector General to impose penalties and assessments, but does not create a private cause of action. *See* 42 C.F.R. § 1003.100 *et seq.* Such penalties and

assessments may be judicially reviewed under certain circumstances. *See* 42 C.F.R. § 1003.127. However, in the instant case, plaintiffs do not seek review of penalties or assessments and there is no allegation that any penalties or assessments were even imposed. Therefore, the court finds that plaintiffs' causes of action do not arise under the Medicare Act.

Plaintiffs also raise the doctrine of *res ipso loquitur,* however the court finds the doctrine inapplicable to the jurisdictional determination in this case. Evidence that defendants were negligent does not provide federal jurisdiction.

Plaintiffs also mention the *Rooker-Feldman* doctrine which precludes federal review by district courts when a state court judgment is challenged by a party to the state court action. *Johnson v. De Grandy*, 512 U.S. 997, 1005, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994). That doctrine is also inapplicable as there is no state court judgment to be reviewed in this case.

Plaintiffs further argue that their constitutional rights were violated, but it is not clear to what constitutional rights they refer. Plaintiffs assert that their claims are premised on the victim's Fourteenth Amendment right to due process. However, it is unclear what due process rights could have been violated. The Due Process Clause of the 14th Amendment protects individuals against governmental action that either "'shocks the conscience,' *Rochin v. California*, 342 U.S. 165, 172, 72 S.Ct. 205, 96 L.Ed. 183 (1952), or interferes with rights 'implicit

in the concept of ordered liberty,' *Palko v. Connecticut,* 302 U.S. 319, 325-326, 58 S.Ct. 149, 82 L.Ed. 288 (1937)." *United States v. Salerno,* 481 U.S. 739, 746, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). The defendants in this case consist of a private, non-profit hospital and private individuals. The court is not aware of any constitutional right that would be impinged by defendants' alleged action or inaction which is the subject of the instant complaint. The court finds mere reference by the plaintiffs to due process violations and to constitutional violations is insufficient to assert a federal claim. *See Adams v. Robertson,* 520 U.S. 83, 89, n. 3, 117 S.Ct. 1028, 137 L.Ed.2d 203 (1997) (per curiam) (concluding that "passing invocations of 'due process' " that "fail to cite the Federal Constitution or any cases relying on the Fourteenth Amendment" do not "meet our minimal requirement that it must be clear that a federal claim was presented"); *Webb v. Webb,* 451 U.S. 493, 496, 101 S.Ct. 1889, 68 L.Ed.2d 392 (1981) (finding a reference to "full faith and credit" insufficient to raise a federal claim without a reference to the U.S. Constitution or to any cases relying on it); *New York Central R. Co. v. New York,* 186 U.S. 269, 273, 22 S.Ct. 916, 46 L.Ed. 1158 (1902) ("[I]t is well settled in this court that it must be made to appear that some provision of the Federal, as distinguished from the state, Constitution was relied upon, and that such provision must be set forth"); *Oxley Stave Co. v. Butler County,* 166 U.S. 648, 655, 17 S.Ct. 709, 41 L.Ed. 1149 (1897) (a party's intent to invoke the Federal Constitution must be "unmistakably" declared, and the statutory

requirement is not met if "the purpose of the party to assert a Federal right is left to mere inference").

Even if federal question jurisdiction existed in this case, defendants argue that this case has not been brought by the proper parties. Alabama's wrongful death statute, provides that "[a] personal representative may commence an action and recover such damages . . . for the wrongful act, omission, or negligence of any person, persons, or corporation, his or their servants or agents, whereby the death of his testator or intestate was caused . . . " ALA. CODE § 6-5-410. Except where the decedent is a minor child, only the personal representative of a decedent may sue for wrongful death. *Hatas v. Partin,* 175 So.2d 759, 761 (Ala. 1965). Defendants assert that under Alabama law, a person must be a licensed attorney to represent a separate legal entity, such as a corporation or estate. *See* ALA. CODE § 34-3-6; *Ex parte Ghafary,* 738 So.2d 778 (Ala. 1998). Plaintiffs' only response is that they diligently sought legal representation for the action but were unable to find an attorney to represent the decedent. Because plaintiffs are not the personal representative of decedent's estate, the case should be dismissed. *See Waters v. Hipp,* 600 So.2d 981, 982 (Ala. 1992) ("One who sues under this section without having been appointed executor or administrator does not qualify under this section as a personal representative, and the suit is a nullity." citations omitted).

Plaintiff requests additional time to amend his complaint and to join additional parties. (Doc. 40).

However, there has been no showing that an amendment would cure the jurisdictional defects in this case. The court finds it would be futile to allow plaintiffs to amend their complaint and/or join additional parties.

CONCLUSION

For the reasons stated above, defendants' motions to dismiss (Docs. 7, 11, 14, 20, 22) are **GRANTED** and this case is hereby **DISMISSED**.

DONE and ORDERED this 2nd day of February, 2005.

/s/ Callie V. S. Granade
CHIEF UNITED STATES
DISTRICT JUDGE

CERTIFICATE OF SERVICE

I, Janice Abner do certify that a copy of document entitled:

> **Petition For order Compelling Grant to Serve as Conservator of An estate & Order For declaratory Judgment of Alabama Code Section 43-2-22 as Unconstitutional**, was served along with three (4Exhibits on the following parties and interested persons on March 17, 2009.

1. Probate Court of Mobile County, Alabama
   P.O. Box 7
   Mobile, Ala, 36601
2. Armbretch Jackson, LLP
   Boyd Reeves, Atty
   P.O. Box 290
   1300 Riverview Plaza
   N. Royal St.
   Mobile, Ala. 36601

Document was mailed in the United States in Inglewood, California with postage full prepaid.

Executed on March 17, 2009

By /s/ Janice Abner
Janice Abner